No. 78-233

In the Supreme Court of the United States

OCTOBER TERM, 1978

PERSONNEL ADMINISTRATOR OF MASSACHUSETTS, ET AL., APPELLANTS

v.

HELEN B. FEENEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE and BRIEF OF THE OFFICE OF PERSONNEL MANAGEMENT, THE UNITED STATES DEPARTMENT OF DEFENSE, THE UNITED STATES DEPARTMENT OF LABOR, AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE*

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The undersigned agencies move for leave to file the annexed brief *amici curiae* to bring before the Court certain considerations, not set forth in the briefs hitherto filed, which we believe will be of interest to the Court.

The Office of Personnel Management, which has assumed many of the functions of the Civil Service Com-

mission, manages federal employment operations and has the primary responsibility for development of policies governing federal civilian employment. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1119-1120; Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037 (1978). As the central federal personnel agency, OPM controls the examination and ranking of job applicants and implementation of the federal veterans' preference. It, therefore, has an interest in insuring that the decision in this case does not adversely affect the federal veterans' preference provisions. After reading all the briefs filed in this case, OPM believes that there is information available concerning the differences between the Massachusetts and the federal statute which is not contained in the briefs and which should be presented to the Court.

The Department of Defense carries out the constitutional responsibility of the Executive Branch to raise and support armies (Article I, Section 8, clauses 12 and 13). The Department has a direct interest in encouraging and rewarding service in the armed forces.

The Equal Employment Opportunity Commission and the Department of Labor have the major responsibility for enforcing federal statutes prohibiting discrimination on the basis of race or sex in employment. EEOC also has been charged with the "develop[ment] of uniform standards * * * and policies defining the nature of employment discrimination on the ground of race * * * [or] sex * * * under all Federal statutes * * * and policies which require equal

employment opportunity." Executive Order No. 12067, 43 Fed. Reg. 28967 (1978); see also Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). The Women's Bureau of the Labor Department is responsible for "formulat[ing] standards and policies which shall promote the welfare of wage-earning women." 29 U.S.C. 13. Thus, EEOC and the Department of Labor have an interest in the standards for proving purposeful employment discrimination. The Department of Labor also has the responsibility for a number of programs which provide special benefits to veterans.*

The undersigned agencies take no position on the validity of the Massachusetts veterans' preference statute. We believe, however, that important considerations concerning the differences between the federal and the state statute and the relevant proof requirements have not been adequately addressed in the briefs filed in this case. We, therefore, request permission to file a short brief *amici curiae* setting forth those considerations.

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* 5 U.S.C. 8521 *et seq.* (Unemployment Compensation—Ex-Servicemen); 29 U.S.C. 49 *et seq.* (Wagner-Peyser Act); 29 U.S.C. 801 *et seq.* (Comprehensive Employment and Training Act of 1973); 38 U.S.C. 2001 *et seq.* (Job Counselling, Training and Placement Services for Veterans); 38 U.S.C. 2011 *et seq.* (Employment and Training of Disabled and Vietnam Era Veterans); 38 U.S.C. 2021 *et seq.* (Veterans' Reemployment Rights).

Respectfully submitted.

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I authorize the filing of this motion and the attached brief.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

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INTEREST OF THE AMICI CURIAE

The Office of Personnel Management, the Department of Defense, the Department of Labor, and the Equal Employment Opportunity Commission wish to present to the Court certain considerations, primarily

regarding the operation of the federal veterans' preference program, which, we believe, have not been fully addressed in the briefs of the parties and *amici curiae*.

The Office of Personnel Management, which has assumed many of the functions of the Civil Service Commission, manages federal employment operations and has the primary responsibility for development of policies governing federal civilian employment. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1119-1120; Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037 (1978). As the central federal personnel agency, OPM controls the examination and ranking of job applicants and implementation of the federal veterans' preference. The Department of Defense carries out the constitutional responsibility of the Executive Branch to raise and support armies (Article I, Section 8, clauses 12 and 13). The Department has a direct interest in encouraging and rewarding service in the armed forces. OPM and the Department of Defense, therefore, have an interest in insuring that the decision in this case does not adversely affect the federal veterans' preference provisions.

The Equal Employment Opportunity Commission and the Department of Labor have the major responsibility for enforcing federal statutes prohibiting discrimination on the basis of race or sex in employment. EEOC also has been charged with the "develop[ment] of uniform standards * * * and policies defining the nature of employment discrimination on the

ground of race * * * [or] sex * * * under all Federal statutes * * * and policies which require equal employment opportunity." Executive Order No. 12067, 43 Fed. Reg. 28967 (1978); see also Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). The Women's Bureau of the Labor Department is responsible for "formulat[ing] standards and policies which shall promote the welfare of wage-earning women." 29 U.S.C. 13. Thus, EEOC and the Department of Labor have an interest in the standards for proving purposeful employment discrimination.[1]

The above agencies take no position on the validity of the Massachusetts veterans' preference statute. We believe, however, that there are important considerations concerning the difference between the federal and the state statute and the relevant proof requirements which have not been adequately addressed in the briefs previously filed in this case and which will be of benefit to the Court.

SUMMARY OF ARGUMENT

1. The national interest in compensating and rewarding veterans is different in quality and character from that of the states and would support the federal system of veterans' preference regardless of the decision in this case.

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[1] Although under Section 712 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-11, veterans' employment preferences are expressly exempt from the proscriptions of Title VII, the EEOC has a substantial interest in the proof requirements for employment discrimination generally.

Furthermore, the Massachusetts absolute preference and the federal point preference are substantially different in both their operation and impact. Although each of the preferences adversely affects women, the federal preference is significantly less burdensome on women seeking higher level positions. The district court found that under the Massachusetts absolute preference, "[f]ew, if any, females have ever been considered for the higher positions in the state civil service" (A. 218). In contrast, studies done by the U.S. Civil Service Commission indicate that while the proportion of women hired is lower because of the federal veterans' preference, women nevertheless have constituted more than one-fourth of those hired for federal jobs requiring professional or administrative skills. Thus the federal point preference, which insures some measure of individual competition, is considerably less extreme in effect than Massachusetts' absolute preference.

2. Although the extent and form of veterans' benefits is a matter to be determined by the legislature, not every veterans' preference, no matter how irrational or extreme, must survive constitutional challenge. Even though such legislation unquestionably serves a legitimate goal, if an illicit motive was a factor in the means chosen to accomplish that goal, judicial deference is not required. Thus, the district court could properly consider whether the extreme form of preference chosen by Massachusetts had a bearing on the issue of improper motivation.

In some circumstances, the method chosen by the legislature may be so arbitrary and extreme in effect as to warrant a finding of discriminatory intent. The district court determined that Massachusetts' absolute preference fell within that category. Whatever the validity of the district court's view, it does not apply to the federal preference.

ARGUMENT

We think it important to point out that neither the federal, nor any other veterans' employment preference, is necessarily implicated with the Massachusetts scheme. Whatever the decision in this case, it will not determine the validity of the federal preference. As discussed in the brief for the United States, the federal government, acting pursuant to its constitutional responsibility to raise and support armies (Article I, Section 8, clauses 12 and 13), has a stronger and different interest than the states in encouraging and rewarding service in the armed forces—the goals of veterans' preference. (Brief for the United States as amicus curiae [hereafter U.S. Brief] at 34-35). The Court recognized in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976), that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." Thus, in *Hampton*, the Court held that a challenged regulation excluding aliens from federal competitive civil service jobs required independent evaluation, even though the Court had earlier held a similar state provision

unconstitutional in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973). See also *Mathews* v. *Diaz*, 426 U.S. 67 (1976) (unholding a federal statute which denied certain medicare benefits to aliens after striking a comparable state provision); cf. *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974) (holding that Congress' "unique obligation" toward Indians justified an employment preference for Indians in the Bureau of Indian Affairs). Similarly, the compelling national interest in compensating veterans, which is different both in quality and character from that of Massachusetts, would in our view support the federal preference regardless of the decision here.

Not only are the governmental interests in veterans' legislation different, but the Massachusetts statute and the federal statute are also substantially different in their operation and impact. For the most part, the federal program relies on a point preference, thereby giving veterans some advantage over non-veterans who receive the same raw score on a civil service entrance examination. The Massachusetts statute, on the other hand, establishes an absolute preference, granting veterans priority over all other job applicants regardless of their comparative scores.[2]

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[2] Although Congress has given disabled veterans first priority to certain jobs (5 U.S.C. 3313), and restricted certain unskilled jobs—those of guards, elevator operators, messengers and custodians—to veterans, if any apply (5 U.S.C. 3310; see U.S. Brief at 4), these preferences are limited in scope and justified by special considerations. The plight of disabled veterans and the nation's heightened obligation to them warrant their special status. As to the few unskilled jobs for which veterans are given priority, it is reasonable to presume that veterans applying for such unskilled jobs are more in need of assistance.

While there is no question that both statutes have a disparate impact on women (U.S. Brief at 6, 35), the federal statute has a less severe effect on women's opportunities for obtaining higher level positions. The district court found that the negative impact of the Massachusetts absolute preference on women is "dramatic": "[f]ew, if any, females have ever been considered for the higher positions in the state civil service" (A. 217, 218). Although 43 percent of those hired by the state from 1963 to 1973 were women, a large percentage of these were employed in lower paying, traditionally female jobs for which men did not apply or they were appointed under a defunct practice allowing requisition of only women for certain jobs (A. 197, 218, 263). The effect of the absolute preference is demonstrated in the 1975 Administrative Assistant eligibility list, which served as a pool for many state positions. As a result of the veterans' preference, the 41 women on the list lost an average of 21.5 places each while the 63 male veterans gained an average of 28 places each (A. 217). The district court found that "[i]f the list had ben compiled without the Veterans' Preference, nearly 40% of the women would have occupied the top third of the list which is now occupied, with one

exception [a female veteran], by men" (A. 217-18).[3] Thus, as Judge Campbell recognized in his concurring opinion on remand, the absolute preference "makes it virtually impossible for a woman, no matter how talented, to obtain a state job that is also of interest to males. Such a system is fundamentally different from the conferring upon veterans of financial benefits to which all taxpayers contribute, or from the giving to them of some degree of preference in government employment, as under a point system, as a *quid pro quo* for time lost in military service" (A. 268-69).

Studies done by the U.S. Civil Service Commission indicate that the federal point preference is significantly less burdensome on women seeking higher level jobs. The "primary entry route" into professional and management level federal jobs is the professional and administrative career examination (PACE). *Veterans' Preference Oversight Hearings, Hearings Before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service,*

[3] In his first dissent, Judge Murray noted that under the federal preference the first woman would have ranked 18th on the eligibility list and plaintiff would not have been reached until at least 31 names were certified. (A. 240 n.14). However, he incorrectly concluded that these women would not have been considered for a position by overlooking the fact that 43 positions held by provisional appointees could have been filled from the list (A. 77-78). See Brief for Appellee at 10 n.13. This demonstrates that as the number of vacancies increases, women have a greater chance of being considered under the federal system. Therefore, the impact on women of the federal point preference is much less predictable than Massachusetts' absolute preference.

95th Cong., 1st Sess. 4 (1977) (Statement of Alan K. Campbell, Chairman, U.S. Civil Service Commission). Of those who passed the examination in 1975, 41 percent were female, 37 percent were male nonveterans, and approximately 20 percent were veterans. Of those who were selected for employment, women constituted 27 percent and veterans 34 percent. Therefore, veterans improved and women correspondingly declined in position by 14 percent after addition of the veterans' preference. *Ibid.*[4]

At present, selection of employees is made from those persons who score within the top five percent. After the veterans' preference and "top-of-the-register" provisions[5] are considered, women make up 29 percent of those in the top 5 percent. It has been estimated that without the preference provisions, they would constitute 41 percent of the top group—an increase of 12 percent. Statement of Chairman Campbell, *Veterans' Preference Oversight Hearings, supra*, at 4.[6] Thus, while the federal veterans' prefer-

[4] Although the veterans' preference provisions should also operate to disadvantage male nonveterans, they are in fact hired in numbers comparable to their share of those who pass the exam. Statement of Chairman Campbell, *Veterans' Preference Oversight Hearings, supra*, at 4.

[5] 5 U.S.C. 3313 requires that disabled veterans be placed at the top of the eligibility list for certain jobs. See note 2, *supra*. Selection for a position must be made from among the three available persons highest on the eligibility list. 5 U.S.C. 3318(a).

[6] The effect of the federal veterans' preference turns in part on economic conditions. Thus, the adverse impact on women is magnified at the present time because of large numbers of applicants and few vacancies.

ence has an adverse impact on women's job opportunities, women are not completely foreclosed from consideration and indeed constituted more than one-fourth of those hired in 1975 for jobs requiring professional or administrative skills.[7]

As the foregoing discussion indicates, the Massachusetts statute, by creating an absolute life-long preference throughout the civil service system, is one of the most extreme veterans' preference provisions. See Fleming & Shanor, *Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?*, 26 Emory L.J. 13, 16-18 (1977); see also *Veterans' Preference Oversight Hearings, supra,* at 10-12. The federal point preference, which insures some measure of individual competition, is considerably less drastic. Indeed, the district court found that the existence of such effective less discriminatory alternatives[8] supported its first conclusion that the

[7] Despite this hiring ratio, women in federal employment, as in the private labor force, remain clustered at the bottom pay scales. Statement of Chairman Campbell, *Veterans' Preference Oversight Hearings, supra,* at 4. Cf. Brief *Amici Curiae* of the National Organization for Women, *et al.*, at 4 n.1. This, of course, is attributable only in part to the veterans' preference. Surveys by the Civil Service Commission and the General Accounting Office indicate that a revision of the preference would have a favorable impact on women in some circumstances, but not others, depending on their occupation. Statement of Chairman Campbell, *Veterans' Preference Oversight Hearings, supra,* at 4-5.

[8] Although the degree of preference in the federal system is less, the federal program is considered highly successful and effective in meeting the goals set by the federal government, which has the primary responsibility for compensating veterans. See *Veterans' Preference Oversight Hearings, supra,* at 3. Veterans constitute approximately 50 percent of the federal service, while they make up only 25 percent of the national labor force. *Ibid.*

absolute preference could not withstand constitutional scrutiny (A. 219-20) and its conclusion on remand that the statute was intentionally discriminatory (A. 265).

As the Solicitor General has stated, the extent and form of veterans' benefits is a matter for Congress and the state legislatures (U.S. Brief at 36-37). This is not to say, however, that any veterans' preference, no matter how extreme or irrational, must survive constitutional challenge.[9] There is no question that the ultimate purpose of the Massachusetts statute and other veterans' preference legislation—to reward veterans—is legitimate. Even though legislation serves a legitimate purpose, however, an illicit

[9] We do not believe that an employment preference is indistinguishable from other forms of veterans' benefits, such as educational benefits and loan programs, which are paid out of general tax revenues. Although an individual's interest in obtaining public employment is not fundamental, *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976), it is considered significant. See, *e.g., Board of Regents* v. *Roth,* 408 U.S. 564 (1972); Blumberg, *De Facto and De Jure Sex Discrimination under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment,* 26 Buffalo L. Rev. 3, 68-69 (1977). Moreover, the veterans' employment preference, unlike forms of financial benefits, places a particular burden on women seeking the opportunity for employment. Cf. *Nashville Gas Co.* v. *Satty,* 434 U.S. 136, 142 (1977) (distinguishing between a policy placing a burden on employment opportunities and one which merely denies women additional financial benefits).

motive may nevertheless have been a factor in the choice of means adopted to accomplish that goal. As the Court explained in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern * * * When there is a proof that a discriminatory purpose has been a motivating factor in the decision * * * judicial deference is no longer justified." [Footnote omitted.] The statement in the brief for the United States that "when the district court found that the purpose of the veterans' preference statute was to aid veterans and not to injure women, that should have been the end of the matter" (U.S. Brief at 31-32), should be read in context: it was based both on the district court's finding that the prime objective of the Massachusetts statute was worthy (A. 254, 264) and also on the statement in its first opinion that the statue "was not enacted for the purpose of disqualifying women from receiving civil service appointments" (A. 212). However, the latter conclusion was made before the decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), at a time when the court believed that a disproportionate impact alone was sufficient to require heightened scrutiny. It was not a considered finding on the complex question of illicit motivation. See Comment, *Veterans' Public Employment Preference as Sex Discrimination*, 90 Harv. L. Rev. 805, 810 n.45 (1977). Therefore, we do not believe that the brief of the United States is

contrary to our position that the district court could properly consider whether the extreme form of preference chosen by Massachusetts had a bearing on the issue of improper motivation (see U.S. Brief at 28-30).[10] It is also significant that the Massachusetts statute is unlike other facially neutral laws because it directly incorporates the military's explicit gender-based classifications. That the discriminatory impact is therefore both foreseeable and "inevitable" (A. 260 n.7) does not in our view warrant heightened scrutiny of the statute, but it is a factor to be considered in determining the legislature's motivation.

As stated in the brief for the United States, insofar as the district court conclusively presumed a discriminatory purpose from the legislature's awareness of predictable disparate impact on women, it was in error (U.S. Brief at 18-19, 26). Foreseeable discriminatory effect is, however, probative evidence of a discriminatory purpose and in some contexts permits an inference of discriminatory intent, which shifts the burden of rebuttal to the state (U.S. Brief at 28-29). We believe that the degree of reasonableness in the legislature's choice of means is probative

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[10] The Court noted in *Village of Arlington Heights, supra*, 429 U.S. at 265 n.11, that " '[l]egislation is frequently multipurposed: the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute' " (quoting *McGinnis* v. *Royster*, 410 U.S. 263, 276-77 (1973)). See also Brest, *Palmer* v. *Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 104 ("Every explicit or implicit distinction made by a law may have objectives.").

of intent, as is the existence of effective less discriminatory alternatives.[11] There is a point where the method chosen by the legislature is so arbitrary and extreme in effect as to warrant a finding of invidious intent. See *Washington* v. *Davis, supra,* 426 U.S. at 241-242 and 254 (Stevens, J., concurring); *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960) (an extreme example in which the boundaries of Tuskegee were changed from a square to a twenty-eight-sided figure, excluding virtually all black voters). The district court concluded that Massachusetts' absolute permanent preference reached that point. Whatever the validity of the district court's view, we emphasize that, as discussed above, the decision does not require a finding that Congress was similarly motivated.[12]

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[11] Professor Brest explains: "A conscientious decisionmaker * * * considers the costs of a proposal, its conduciveness to the ends sought to be attained, and the availability of alternatives less costly to the community as a whole or to a particular segment of the community. That a decision obviously fails to reflect these considerations with respect to any legitimate objective supports the inference that it was improperly motivated." Brest, *Palmer* v. *Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, supra,* 1971 Sup. Ct. Rev. at 121-122. See also Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,* 86 Yale L. J. 317, 337-340 (1976). Cf. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975) (existence of an effective less discriminatory alternative is evidence that more burdensome means were chosen as a "pretext" for discrimination).

[12] The district court specifically noted that it was not passing on the validity of the federal provisions (A. 220).

Respectfully submitted.

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